BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman

WILLIAM MUNDELL
Commissioner

MARC SPITZER
Commissioner

MIKE GLEASON
Commissioner

KRISTIN K. MAYES
Commissioner

LEVEL 3 COMMUNICATIONS, LLC,	
Complainant,	Docket No. T-03654A-05-0415 T-01051B-05-0415
vs.	
QWEST CORPORATION,	**LEVEL 3'S REPLY BRIEF**
Respondent.	

INTRODUCTION

Level 3 Communications, LLC, ("Level 3") respectfully submits this Reply Brief in opposition to Qwest's Opening Brief and in further support of Level 3's Opening Brief and request for judgment in its favor in relation to all claims raised in its Complaint.

Qwest offers two broad arguments in support of its position that it is not required to pay intercarrier compensation for "VNXX" calls originated by Qwest customers and terminated to Level 3's ISP customers. First, Qwest claims that when the FCC, in the *ISP Remand Order,* used the phrase "ISP-bound traffic," it meant something different from, and less than, "traffic bound for an ISP." Second, Qwest contends that requiring intercarrier compensation for the termination of ISP-bound calls originated in one local calling area to an ISP server located in another local calling area amounts to an improper assault on what Qwest refers to as the "century old fundamental distinction between local and long distance calls." Qwest's arguments are without merit and should be rejected.

ARGUMENT

I. Calls Originated By Qwest Customers to an ISP Are "ISP-Bound Traffic" Subject to the FCC's Intercarrier Compensation Rules

Central to Qwest's argument is the remarkable claim that, when the FCC used the phrase "ISP-bound traffic" in the *ISP Remand Order,* it did not mean "traffic bound for an ISP." Rather, according to Qwest, what the FCC meant in using the phrase "ISP-bound traffic" was *"only some* traffic bound for an ISP." Qwest's argument not only defies the plain meaning of the language used and notions of common sense, but is not supported by the authorities on which Qwest relies.

In order to reach the conclusion that "ISP-bound traffic" does not mean "ISP bound traffic," Qwest relies on strained and incorrect inferences drawn from out-of-context snippets from the *ISP Remand Order* while ignoring the over-arching purpose and intent of that Order. The *ISP Remand Order* represents one stage in the FCC's continued thinking about how to treat ISP-bound traffic for purposes of reciprocal compensation.[1] With the *ISP Remand Order,* the FCC was responding to a decision by the D.C. Circuit Court of Appeals rejecting a previous effort to establish rules and a rationale for intercarrier compensation for calls directed to an ISP.[2] In its Order, the FCC noted that Section 251(b)(5)'s reciprocal compensation requirement on its face applied to all telecommunications, which would include all "information access" traffic, including, specifically, calls to ISPs. In this connection it noted

[1] Level 3 also refers the ALJ to its Opening Brief for a further discussion of the pertinent FCC and court decisions regarding ISP traffic in general and the *ISP Remand Order* in particular.

[2] *See Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000) (vacating In the Matter of Implementation of theLocal Competition Provisions of the Telecommunications Act of 1996; Inter-carrier Compensation for ISPBound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CCDocket No. 99-68, CC* Docket Nos. *96-98,99-69* (February *26, 1999) ("ISP Declaratory Ruling").*

that its original decision to limit the reach of Section 251(b)(5) to "local" traffic was a mistake that had created ambiguity, because "local" was not a term that was used or defined in the underlying statute. It therefore amended its reciprocal compensation rules to remove all references to "local" traffic.[3] Because the FCC, in its *ISP Remand Order*, entirely eliminated the word "local" from its intercarrier compensation rules, Qwest's belabored argument regarding which ISP-bound calls are "local" and which are "non-local" misses the point.

The FCC itself described what it was doing broadly, as establishing "the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)."[4] This statement is not qualified in any way. It does not refer to "local traffic delivered to ISPs." It does not refer to "traffic delivered to ISPs within an ILEC local calling area." It refers without limitation to any and all "telecommunications traffic delivered to" ISPs. If the FCC actually meant to limit its new regime to what Qwest would call "local" ISP-bound traffic, it would have said so.

Indeed, in a companion order to the *ISP Remand Order* issued the same day, the FCC used similarly expansive language. In its *Intercarrier Compensation NPRM,*[5] the FCC described the *ISP Remand Order* as follows:

> In a related order that we are adopting today ("*ISP Intercarrier Compensation Order*"), we address intercarrier compensation for traffic that is specifically bound for Internet service providers ("ISPs"). We adopt interim measures that, for the next three years, will significantly reduce, but not altogether eliminate, the flow of intercarrier payments associated with delivery of dial-up traffic to ISPs.[6]

The FCC did not suggest that the *ISP Remand Order* was limited to "local" ISP-bound traffic. To the contrary, it characterized the *ISP Remand Order* as addressing "intercarrier compensation for traffic that is specifically bound for" ISPs—with no concern or qualification about where those ISPs might be located. Indeed, a fair reading of this language is that the FCC

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[3] *ISP Remand Order* at ¶¶ 45-46.

[4] ISP Remand Order at ¶1.

[5] In the Matter of Developing A Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-92 (released April 27, 2001) ("Intercarrier Compensation NPRM").

[6] *Intercarrier Compensation NPRM* at ¶ 3 (footnote citing *ISP Remand Order* omitted).

thought it had, at least for the time being, put disputes about compensation for ISP-bound traffic to bed. This would make no sense if the FCC had intended the *ISP Remand Order's* compensation regime not to apply to the "routine" practice of CLECs serving ISPs by means of VNXX arrangements.[7]

The *ISP Remand Order* establishes a specific mechanism to be used in determining whether traffic is "ISP-bound traffic" subject to intercarrier compensation. Under that mechanism, when the traffic terminated by a carrier exceeds traffic originated by that carrier by a ratio of more than 3 to 1, then the traffic is presumed to be ISP-bound traffic.[8] As discussed in Level 3's Opening Brief, this mechanism is incorporated into the parties' Interconnection Agreement, as amended. This rule does not distinguish between ISP-bound traffic based on the location of the ISP server. Accordingly, the presumption would make no sense if the obligation to pay intercarrier compensation depended on the location of the ISP server.

Qwest appears to believe that, because the FCC, at various points in the *ISP Remand Order,* made reference to ISP modem banks being located within the originating caller's local calling area, this means that ISP-bound calling to centrally located modem banks is outside the scope of the rules—a construction that would effectively narrow the impact of this major order to a few large cities where ISPs are based. Qwest relies, in particular, on language in the *ISP Remand Order* purporting to describe the "typical" way in which ISP-bound calls are completed, as well as language from the *WorldCom* case characterizing the holding of the *ISP Remand Order.* However, Qwest asks this Commission to elevate this *dicta* in the *ISP Remand Order* over the actual reasoning the FCC used to establish its interim compensation regime.

As a threshold matter, the FCC's description of the "typical" arrangement obviously cannot be read to mean that the *ISP Remand Order* applies exclusively to such arrangements, as Qwest contends. Indeed, in describing what the FCC referred to as the "typical" arrangements, the FCC implicitly acknowledged the existence of "atypical" arrangements and did not exclude

[7] Comments of SBC Communications Inc., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98,99-68 (filed July 21, 2000) at 43.

[8] *ISP Remand Order* at ¶ 79.

those arrangements from the sweep of its interim ISP-bound compensation scheme. This stands as further evidence that the *ISP Remand Order* applies to all ISP-bound traffic, and not just what Qwest calls "local" ISP-bound traffic.

In *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*,[9] SBC, the owner of Southern New England Telephone Company, relied on the very same language relied on here by Qwest. The district court rejected those arguments, stating:

> SBC argues that in a number of places the language of the *ISP Remand Order* makes clear that the FCC was discussing local ISP-bound traffic. SBC points to the FCC's statement that "the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the *same local calling area,*" *id.* P13 (emphasis supplied), and to the D.C. Circuit's statement that the FCC held that it could "'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs') located ***within the caller's local calling area,*** " *WorldCom v.* FCC, 351 U.S. App. D.C. 176, 288 F.3d 429, 430 (D.C. Cir. 2002) (emphasis supplied).
>
> I agree that these statements indicate the FCC began by addressing the question whether ISP-bound traffic that would typically be subject to reciprocal compensation -- which at the time would have consisted of "local" ISP-bound traffic -- was nevertheless exempt. In other words, because at the time only "local" traffic was subject to reciprocal compensation, the question before the FCC was whether "local" ISP-bound traffic was exempt from reciprocal compensation. Other forms of ISP-bound traffic were already exempt because they were not "local."
>
> What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order.* In answering the question, the FCC: (a) disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether "local" ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.[10]

The Connecticut federal district court "got it right." Had the FCC wished to create such a significant and far-reaching limitation on its intercarrier compensation rules, one would certainly expect to see more than the exceedingly skimpy evidence that Qwest has been able to supply.

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[9] 359 F.Supp.2d 229 (D. Conn. 2005).

[10] 359 F.Supp.2d at 231-32 (emphasis in original).

The United States District Court for the Northern District of Illinois, in *AT&T v. Illinois Bell,* also concluded that the *ISP Remand Order* applied to all ISP-bound traffic and did not permit the Illinois Commerce Commission to require bill-and-keep for ISP-bound VNXX traffic while retaining compensation at the $.0007 rate cap for non-VNXX ISP-bound and voice traffic.[11] In that case, the court ruled that the *ISP Remand Order* requires that the rate charged for all ISP-bound traffic, whether VNXX traffic or otherwise, must be the same as for traffic under Section 251(b)(5).[12] The court could not have reached this determination without also concluding that the *ISP Remand Order* applies to all ISP-bound traffic, specifically including VNXX traffic.

Other decision makers have also concluded that the *ISP Remand Order* applies to all ISP-bound traffic, not just "local" ISP-bound traffic. For example, the Washington Utilities and Transportation Commission ("WUTC") held that the *ISP Remand Order* applied to all ISP bound traffic, not just "local" ISP bound traffic. Responding to CenturyTel's argument that references in the *ISP Remand Order* and *Worldcom* decision to "local" traffic demonstrated that the *ISP Remand Order* applied only to "local" traffic, the WUTC stated "[t]he substance of the [*ISP Remand Order and Worldcom*] decisions makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic."[13] The Commission therefore upheld the arbitrator's decision rejecting CenturyTel's argument.[14] More recently, two Administrative Law Judges at the WUTC rejected the same arguments by Qwest, citing both the WUTC's decision in the *Level 3-CenturyTel Order* and the *SNET v. MCI Worldcom* decision.[15] The

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[11] *AT&T v. Illinois Bell*, slip op. at 6 (March 25, 2005). In that decision, the court referred to VNXX traffic as "ISP-bound FX [foreign exchange] traffic." A copy of the opinion is attached as Attachment A to this Reply Brief.

[12] *Id.*

[13] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S C. Section* 252, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶ 10 (Feb. 28, 2003), *affirming* Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶(33-35 (Jan. 2, 2003) ("*Level 3-CenturyTel Order*").

[14] *Id.*

[15] *See Pac-West Telecom, Inc. v. Qwest Corp.,* Docket No. UT-053036, Order No. 03, Recommended Decision to

1695835.2

New Hampshire PUC has also concluded that intercarrier compensation for ISP-bound VNXX traffic, not just local ISP- bound traffic, was governed by FCC rules, and thus its dockets concerning VNXX "exclude[] any ruling regarding inter-carrier compensation for ISP-bound traffic."[16]

Furthermore, when the FCC Wireline Competition Bureau itself acted as an arbitrator in lieu of the Virginia Corporation Commission, the Bureau never gave any indication that the scope of the *ISP Remand Order* extended only to "local" ISP-bound calls, rather than all ISP-bound calls.[17] To the contrary, the Bureau required that all calls—whether or not ISP-bound—be rated according to the NPA-NXX of the telephone numbers associated with the calls.[18] Rating all calls according to the NPA-NXX of the telephone numbers associated with the calls treats all ISP-bound traffic exchanged between two LECs according to the interim regime established in the *ISP Remand Order,* without distinguishing between a physically "local" ISP and a distant ISP.

II. <u>The Issues Raised in this Case Do Not Implicate Arizona Law Regarding the Definitions of Local Calling Areas</u>

Qwest refers in its brief to what it calls "the century old fundamental distinction between local and long distance calls" and also contends that Level 3's position is inconsistent with Arizona law regarding the definition of local calling areas. Qwest is wrong on both counts.

First, the notion that there is some inviolable bright line between local and long distance calls is no longer accurate. Even assuming that such a clear distinction once existed, that bright

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Grant Petition at ¶¶ 31, 37 (Aug. 23, 2005); *Level 3 Communications, LLC v. Qwest Corp.,* Docket No. UT-053039, Order No. 03, Order Denying in part and Granting in part Level 3's Motion for Summary Determination; Denying in part and Granting in part Qwest's Motion for Summary Determination, at ¶¶ 34-35 (August 26, 2005) *("Level 3- Qwest Washington Decision").*

[16] *See Investigation as to Whether Certain Calls are Local,* Final Order, Order No. 24,080, 2002 N.H. PUC Lexis 165, 46-47 (October 28, 2002) *("NH VNXX Order").*

[17] *See* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Memorandum Opinion and Order, 17 FCC Rcd. 27039, 27158-27176 (¶¶ 244-85) (2002) (discussing intercarrier compensation for ISP-bound traffic) ("Virginia Arbitration Order").

[18] *Id.* at ¶¶ 286-88.

line has long since gone the way of the rotary telephone. Qwest has offered FX service for many years[19] and its affiliate offers a service to ISPs that it refers to as "Qwest Wholesale Dial."[20] Although Qwest may dispute the extent to which these services are the same as VNXX service, the salient point is that these are services that are provided by Qwest to allow an ISP customer (or a non-ISP customer) to have telephone numbers in local calling areas that are different from the local calling area in which the customer is physically located. Many companies, including Qwest, offer a wide variety of flat-rated, "all distances" packages, further eroding the distinction between local and long distance calling and expanding options available to consumers. Wireless and VOIP[21] are newer technologies that have also eroded not only the distinction between local and long distance calling, but also the concept that a telephone number is identified with a particular physical location.[22]

Second, Qwest once again ignores the plain language of the parties' Interconnection Agreement, which provides for reciprocal compensation for ISP-bound traffic. Under the Agreement, all ISP-bound traffic is "created equal." The ISP Amendment states that the "Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP [Remand] Order."[23] The Agreement does not state that some ISP-bound traffic will be subject to the *ISP Remand Order*'s compensation mechanism while other ISP-bound traffic will not. Indeed, in reviewing the parties' Interconnection Agreement, state law contract principles should apply.[24] Arizona law, which governs this contract, provides that a contract should be construed in accordance with the plain meaning of its terms.[25] In this case, the plain

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[19] *See* Qwest's Response to Level 3's Data Request No. 23, attached as Exhibit A to Opening Brief.

[20] See httpl://www.qwest.como/wholesale/pcat/natdial.html for a description of the Wholesale Dial product.

[21] *See In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No. 03-211, Memorandum Opinion and Order (rel. November 12, 2004) *("Vonage Order").* In the *Vonage* case, the FCC clearly sanctioned the use of telephone numbers that are not tied to any specific geographic location. *See Vonage Order* at ¶ 24.

[22] *See id.*; *see also In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*; WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking (rel. June 3, 2005) at ¶ 57.

[23] *ISP Amendment* at ¶ 3.

[24] *See Starpower Communications v. Verizon South*, 17 FCC Rcd. 6873 (Apr. 8, 2002).

[25] *See Horton v. Mitchell*, 200 Ariz. 523, 527, 29 P.3d 870, 874 (App. 2001).

language of the parties' Interconnection Agreement makes clear that compensation is due for all ISP-bound traffic.

Indeed, Qwest itself concedes that the existing Interconnection Agreement covers the exchange of VNXX traffic. It has done so by proposing an amendment to the Interconnection Agreement that seeks to exclude VNXX traffic both from the calculation of intercarrier compensation and also from the calculation of the Relative Usage Factor. If it were the case that the Interconnection Agreement, as it presently exists, did not contemplate the exchange of VNXX traffic, as Qwest contends, there would be no reason to offer such an amendment. Further, Qwest's proposed amendment also stands as a recognition that the *ISP Remand Order* similarly contemplates the existence of ISP traffic. The Interconnection Agreement expressly incorporates the requirements of the *ISP Remand Order.* If it were the case that VNXX traffic was already excluded from the scope of that Order, there would be no reason for Qwest to offer such an amendment.

III. <u>Level 3's Assignment of Telephone Numbers Does Not Violate Industry Guidelines</u>

Qwest's argument that Level 3's assignment of telephone numbers violates industry guidelines is a red herring designed to distract from the issues raised by Level 3's Complaint. Indeed, when the relevant regulations are examined in detail, it is clear that Level 3's practice is consistent with industry guidelines and practices.

First, Qwest is incredibly selective in its quotation from and interpretation of Rule 52.13. Qwest argues that the rule notes, and indicates conformity with, some industry guidelines that Qwest says have the effect of banning VNXX arrangements. But this argument ignores other important provisions of the same rules. For example, Rule 52.13 states that the North American Numbering Plan Administrator "shall assign and administer [numbering] resources in an efficient, effective, ***fair, unbiased, and nondiscriminatory*** manner consistent with industry-developed guidelines ***and Commission regulations.***"[26] So the very rule on which Qwest relies requires that numbering authorities be non-discriminatory, in a manner "consistent

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[26] 47 C.F.R. § 52.13(b) (emphasis added); *see also* 47 C.F.R. § 52.13(d) (to the same effect).

with … [FCC] regulations." But Rule 52.9(b), quoted above, gives specific content to what it means to be "fair" and "nondiscriminatory" in the assignment of numbers: namely, facilitating market entry; not favoring any existing industry segment (like traditional LECs over CLECs); and not favoring any particular technology (like circuit-switching over packet switching).

Moreover, Rule 52.13 does not, as Qwest suggests, weld numbering resources to traditional uses. To the contrary, that rule expressly recognizes that nontraditional uses of numbering resources will arise. The Rule does not say to ban them or to prevent carriers from offering services using them. To the contrary, it says that numbering authorities should explore how to make the resources available—including, specifically, central office codes (NXXs).[27]

In this regard, the FCC has expressly recognized that CLECs "are able to serve larger geographic areas because they can deploy higher capacity switches and use dedicated transport in combination with those switches to serve customers throughout a wider geographic area, beyond the particular wire center where the switch is located." As a result, CLECs "can and do serve such areas using switches located in other areas."[28] Indeed, the FCC specifically found that "[c]ompetitive LECs can rely on newer, more efficient technology than incumbent LECs

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[27] Rule 52.13(b), subsections (11)-(13), state that the numbering administrator's tasks include: "(11) Reviewing requests for all numbering resources to implement new applications and services and making assignments in accordance with industry-developed resource planning and assignment guidelines; (12) Referring requests for particular numbering resources to the appropriate industry body where guidelines do not exist for those resources; [and] (13) Participating in industry activities to determine whether, when new telecommunications services requiring numbers are proposed, NANP numbers are appropriate and what level of resource is required (*e.g.,* line numbers, central office codes, NPA codes)." In this regard, the NXX code is a "central office" code. *See* Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability; CC Docket Nos. 99-200, 96-98, & 95-116, *Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200* (released June 18, 2003) at ¶ 1 n.1 ("The NANP was established over 50 years ago by AT&T to facilitate the expansion of long distance calling. It is the basic numbering scheme for the United States, Canada, and most Caribbean countries. The NANP is based on a 10-digit dialing pattern in the format NXX-NXX-XXXX where "N" represents any digit 2-9 and "X" represents any digit 0-9. … The second three digits represent the ***central office code***, or NXX, commonly referred to as an exchange.") In other words, NXXs designate central offices (basically, switches) within the PSTN. Yet the FCC has recognized from the beginning that CLECs will not deploy networks that duplicate the ILEC's network; instead, CLECs will often deploy a few centrally-located switches that serve a wide area. *See* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1090. From the beginning, therefore, there has been no *necessary* connection between a particular NXX code and any particular end user's location.

[28] *Order on Remand,* Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd 2533 (2005) *petitions for review pending, Covad Communications Corp., et al. v. FCC, et al.,* Nos. 05- 1095 et al. (D.C. Cir.). at ¶ 207 (footnotes omitted).

(whose networks have been deployed over decades), such as packet switches."[29] If the CLEC switch serving a particular wire center is located outside of that wire center, the CLEC's numbers associated with that wire center will necessarily "reside" in the distant switch, not in the wire center itself. This is the inevitable result of deploying a more efficient network, and is not in any way an effort to "game" or distort numbering rules. In this regard, FCC Rule 52.15(g)(4) clearly permits states to authorize the use of numbering resources that depart from their traditional uses. While Level 3 believes that it meets all relevant criteria, this rule empowers the Commission to authorize VNXX arrangements in any event.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Level 3's Opening Brief, Level 3 requests that the Commission grant judgment in favor of Level 3 on the claims raised in its Complaint.

RESPECTFULLY SUBMITTED this 21st day of December, 2005.

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29 *Id.* (footnote omitted).

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ATTACHMENT A

116 FILE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AT&T COMMUNICATIONS of ILLINOIS, INC., TCG ILLINOIS and TCG CHICAGO,	)	
Plaintiffs,	)	
v.	)	No. 04 C 1768
ILLINOIS BELL TELEPHONE COMPANY, INC. d/b/a SBC ILLINOIS and EDWARD C. HURLEY, ERIN M. O'CONNELL-DIAZ, LULA M. FORD, MARY FRANCES SQUIRES and KEVIN K. WRIGHT, in their official capacities as Commissioners of the Illinois Commerce Commission,	)	Judge Ronald A. Guzmán
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago (collectively, "AT&T") have filed this suit against SBC Illinois ("SBC") and the Illinois Commerce Commission ("ICC")[1] pursuant to section 252 of the Telecommunications Act of 1996 seeking review of an ICC arbitration decision. For the reasons set forth below, the ICC's decision is affirmed in part and reversed in part.

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[1]By suing the Commissioners in their official capacities, AT&T has actually sued the Commission itself, *see Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (stating that suit against a government officer in his official capacity constitutes suit against the entity that employs him), a suit that our court of appeals has held does not offend the Eleventh Amendment. *See MCI Telecommunications Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 348 (7th Cir. 2000) (holding that a state waives its Eleventh Amendment immunity by"exercising the power delegated to [it] by the [Telecommunications] Act" and, even if there were no waiver, suits pursuant to the Act would fall into the *Ex parte Young* exception to immunity).

Background

Congress enacted the Telecommunications Act of 1996 to open up the local telephone service market to competition. Toward that end, the Act requires incumbent local exchange carriers ("ILECs"), like SBC, to share their networks with competing local exchange carriers ("CLECs"), like AT&T. 47 U.S.C. § 251(c)(2). The Act permits ILECs and CLECs to negotiate agreements that govern access to the networks. 47 U.S.C. § 252(a)(1). If the parties are unable to agree to the terms of an agreement, they may petition a state commission with jurisdiction over telecommunications issues to arbitrate their disputes. 47 U.S.C. § 252(b)(1). The state commission takes evidence and hears argument from the parties and rules on the issues. 47 U.S.C. § 252(b)(4). After the commission rules, the parties must submit the agreement, as revised by the arbitration, to the commission for approval. 47 U.S.C. § 252(e)(1). After the commission approves or rejects the agreement, either party may seek review in federal court. 47 U.S.C. § 252(e)(6).

AT&T and SBC followed this arbitration procedure with the ICC, but neither is wholly satisfied with the agreement that resulted. Thus, they have asked the Court to review the agreement and determine whether various of its provisions comply with the Act.

Discussion

Whether the interconnection agreement approved by the ICC complies with the Act and its regulations is a question of law that is subject to *de novo* review. *Ind. Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 385 (7th Cir. 2004). Any factual determinations made by the ICC, however, will be set aside only if they are "arbitrary or capricious." *Id.* With these principles in mind, we turn to the parties' contentions.

AT&T challenges four of the provisions approved by the ICC: (1) the "bill and keep" (*i.e.*, no charge) arrangement for terminating internet service provider ("ISP")-bound foreign exchange ("FX") traffic (*i.e.*, long-distance traffic that uses a virtual local number so the party making the call is not charged a toll); (2) the bill and keep arrangement for terminating voice (*i.e.*, non-ISP bound) FX traffic; (3) the requirement that AT&T allow SBC to share, free of charge, the D-links, (*i.e.*, the facilities that AT&T and SBC use to connect their networks) that AT&T leases from SBC; and (4) the bill and keep arrangement for SS7 signaling (*i.e.*, the signaling information AT&T and SBC must exchange to complete telephone calls).

SBC challenges three of the ICC-approved provisions, which require that it: (1) provide AT&T with unbundled dedicated transport (*i.e.*, facilities used only by AT&T to transmit telecommunications between switches) between AT&T's switch and SBC's switch; (2) lease unbundled network elements to AT&T so AT&T can provide telecommunications services to itself and its affiliates; and (3) combine unbundled network elements for AT&T without regard to the limitations on combining obligations set forth by the United States Supreme Court.

AT&T'S CHALLENGES

ISP-Bound FX Traffic

The Act requires local telecommunications carriers to connect their networks so that customers of various carriers can call one another. 47 U.S.C. § 251(c)(2). But it does not require carriers to terminate, or complete, each other's calls free of charge. Rather, it envisions "reciprocal compensation" in which carriers pay each other a fee to terminate calls to their customers. 47 U.S.C. § 251(b)(5) (stating that each ILEC has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications").

The assumption underlying reciprocal compensation is that local traffic between carriers is relatively balanced. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, 11 F.C.C.R. 15,499 ¶ 1112 (1996) (*"First Report"*). The popularity of the Internet however, cast serious doubt on that assumption. Unlike traditional voice traffic, ISP traffic is generally one-way; that is, ISPs receive a large volume of calls but place virtually none. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand, 16 F.C.C.R. 9151 ¶ 2 (2001) (*"Remand Order"*). Thus, a carrier whose customer is an ISP terminates a huge volume of calls that originate on other carriers' networks, and charges a termination fee each time, but because the ISP originates few, if any, calls, it generates virtually no termination fees for other carriers. *Id.*

In 2001, the FCC addressed this traffic imbalance in the *Remand Order*. First, the agency said that the ISP-bound traffic was not section 251(b) traffic, which is subject to reciprocal compensation, but fell within the exceptions enumerated in section 251(g) of the Act. *Id.* ¶ 1. Second, it concluded that a bill and keep payment system, in which carriers charge their customers, rather than one another, for terminating ISP-bound traffic, would be the fairest and most efficient compensation system for such traffic. *Id.* ¶ 4.

The FCC did not, however, mandate that a bill and keep system be immediately instituted for ISP-bound traffic. Rather, it adopted an interim system that would "limit, if not end, the opportunity for regulatory arbitrage, while avoiding a market-disruptive 'flash cut' to a pure bill and keep regime." *Id.* ¶ 77. That system set a series of intercarrier rate caps for ISP-bound traffic that declined over time from \$.0015 per minute to \$.0007 per minute. *Id.* ¶ 78. The rate caps, the FCC emphasized, applied only to intercarrier compensation that exceeded the caps:

> We also clarify that, because the rates set forth above are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation.

Id. ¶ 80. But, the agency said, ILECs, like SBC, would not be permitted to "pick and choose" intercarrier compensation rates. *Id.* ¶ 89. Thus, "the rate caps for ISP-bound traffic . . . apply . . . only if an [ILEC] offers to exchange all traffic subject to section 251(b)(5) [*i.e.*, traffic subject to reciprocal compensation] at the same rate." *Id.*

In the arbitration before the ICC, AT&T argued that ISP-bound FX traffic is subject to the interim intercarrier compensation system set forth by the FCC in the *Remand Order*. (R. at C-03977-78, Arbitration Decision at 118-19.) The ICC disagreed. In its view, the *Remand Order* enabled it to retain the bill and keep arrangement for ISP-bound FX traffic that existed in Illinois. (*See id.* at C-03979, Arbitration Decision at 120.) AT&T says that conclusion is at odds with the *Remand Order* because: (1) it sets a rate different from the interim rate structure; and (2) violates the requirement that rates charged for ISP-bound traffic mirror those charged for traffic subject to reciprocal compensation.

The *Remand Order* does not require state commissions to adopt the interim rate structure. On the contrary, it explicitly says that the interim rate structure has "no effect" if "states have ordered LECs to exchange ISP-bound traffic either at rates below the caps . . . or on a bill and keep basis." *Remand Order* ¶ 80. The ICC has consistently subjected ISP-bound FX traffic to bill and keep, *see*

R. at C-03979, Arbitration Decision at 120 (listing decisions), an arrangement the *Remand Order* endorses.

The *Remand Order* does, however, require ILECs that exchange ISP-bound traffic on a bill and keep basis to exchange section 251(b)(5) traffic on that basis as well. *Remand Order* ¶ 89. Traffic subject to section 251(b)(5), the FCC said, is all telecommunications *except* "exchange access, information access, and exchange services for such access provided to IXCs [interexchange carriers] and information service providers." *Id.* ¶¶ 42, 46. Thus, the *Remand Order* requires ILECs to charge the same rate for local voice traffic, which is subject to section 251(b)(5), as they do for ISP-bound traffic, which is not.

SBC urges a different interpretation of this "mirroring" provision. In its view, the provision is not violated if like traffic is treated alike. Because the ICC subjects all FX traffic, ISP-bound or otherwise, to bill and keep, SBC says its decision is sound.

SBC's interpretation contradicts the plain language of the *Remand Order*. The *Order* does not direct state commissions to treat like traffic alike, but to treat different kinds of traffic alike. It explicitly states that ILECs must charge the same rate for ISP-bound traffic, which is excluded from 251(b)(5), as it does for traffic that is subject to that section. *Remand Order* ¶ 89. Thus, the issue is not whether SBC charges the same rate for both voice FX and ISP-bound FX traffic, but whether it charges the same rate for ISP-bound traffic, FX or otherwise, as it does for traffic that is subject to section 251(b)(5). The answer, according to the parties' interconnection agreement is no. (R. at C-00617, Interconnection Agreement, Pricing Schedule at 13 (setting price for terminating local calls at $.003746 per minute).) Because SBC charges AT&T to terminate voice traffic that is subject to section 251(b)(5), the ICC's adoption of a bill and keep system for ISP-bound FX traffic violates the mirroring provision of the *Remand Order*.

Voice FX Traffic

In the arbitration, the ICC also decided that voice FX traffic would be governed by bill and keep. AT&T says that decision is erroneous because: (1) section 251(g) exempts certain traffic from reciprocal compensation, but only if that traffic was governed by other federal compensation rules before 1996; and (2) even if that section has a broader application, it still does not apply because voice FX traffic does not fall within any of its enumerated categories.

Section 251(g) provides:

> On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

Because there were no federal compensation rules pertaining to voice FX traffic before 1996, AT&T says this section has no application.

The Court disagrees. Section 251(g) requires certain carriers to abide by compensation arrangements that existed prior to the Act until the FCC enacted new regulations pertaining to them. It does not, however, shield carriers who were not governed by pre-existing arrangements from the reach of any post-Act regulations. Among the regulations promulgated by the FCC after the Act is 47 C.F.R. § 51.701(a)(1), which exempts from reciprocal compensation all telecommunications traffic that is "interstate or intrastate exchange access, information access, or exchange services for such access." Consequently, if voice FX traffic falls into any of those categories, it is exempt from reciprocal compensation, whether or not it was governed by a pre-1996 compensation arrangement.

The next question, of course, is whether voice FX traffic falls into any of those categories. The answer is no. No one suggests that voice FX traffic is information access. It is also not exchange access because AT&T does not charge its customers a separate fee for voice FX calls, a statutory prerequisite to exchange access. *See* 47 U.S.C. § 153(16) (defining exchange access as "offering of access to telephone exchange services . . . for the purpose of the origination or termination of telephone toll services"); 47 U.S.C. § 153(48) (defining "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service"). Nor can voice FX traffic be exchange service because the statute assumes such service is provided for information or exchange access. *See* 47 U.S.C. § 251 (g) (requiring ILECs to "provide exchange access, information access, and *exchange services for such access* to interexchange carriers and information service providers in accordance with the same . . . interconnection restrictions and obligations" in effect before February 8, 1996) (emphasis added).

SBC and the ICC urge us to disregard the language of the statute and adopt the position taken by the ICC in *In re Level 3 Communications, Inc.*, I.C.C. No. 00-0332, 2000 WL 33424133, at *7 (I.C.C. Aug. 30, 2000): that FX traffic is not subject to reciprocal compensation because it "does not originate and terminate in the same local rate center," whether or not a toll charge is levied on it.

But the regulations governing reciprocal compensation have changed since the ICC decided *Level 3*. When that arbitration was decided, the regulations restricted reciprocal compensation to "local telecommunications traffic," which was defined as "[t]elecommunications traffic between [an ILEC] and [another] telecommunications carrier . . . that originates and terminates within a local service area established by the state commission." 47 C.F.R. § 51.701(b)(1) (2000). Based on the regulation, the ICC concluded that FX traffic could not, as a matter of law, be subject to reciprocal compensation because such traffic travels between different local rate centers. *Level 3*, 2000 WL 33424133 at *7

After *Level 3*, however, the regulations were changed. They no longer restrict reciprocal compensation to "local" traffic. Rather, they now echo the statute and say that reciprocal compensation applies to all telecommunications traffic except that which is "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701 (2004). As discussed above, those terms, as defined by the statute, do not encompass voice FX traffic. Thus, though it may be sound, as a matter of policy, to exclude voice FX from the reach of reciprocal compensation, the ICC cannot ignore the plain language of the statute to effect those policy goals. The ICC's determination that voice FX traffic is subject to bill and keep is, therefore, erroneous.[2]

Sharing of D-links

AT&T also challenges the ICC's requirement that it share its D-links with SBC, free of charge. D-links are facilities used to connect AT&T and SBC's SS7 networks, the networks that

[2]The parties do not contend that there is balance of voice FX traffic between the two carriers. Thus, we need not examine whether the exception to reciprocal compensation applies. *See First Report* ¶ 1111 ("As an additional option for reciprocal compensation arrangements for termination services, we conclude that state commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so . . . .").

transmit and receive the signaling information necessary to complete telephone calls. (*Id.* at C-03895-96, Arbitration Decision at 36-37.) AT&T leases the D-Links its uses from SBC.

Initially, those D-Links were used only by AT&T to receive the SS7 signaling information from SBC necessary to complete its customers' long-distance calls to SBC's local customers. But when AT&T entered the local telephone market, SBC started to use those links to receive SS7 signaling information from AT&T that it needed to complete its customers' calls to AT&T's local customers. AT&T believes that SBC's use of the D-Links makes them "shared facilities," for which SBC must help pay.

According to the FCC, a facility is shared if it is used "by multiple parties." *First Report* ¶ 741. The regulations require that the costs of shared facilities "be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users." 47 C.F.R. § 51.507.

There is no dispute that SBC and AT&T both use the D-Links. (R. at C-03898, Arbitration Decision at 39.) But SBC says the shared facilities regulation does not apply because the D-Links are not new facilities developed for the exchange of section 251(b) traffic, the only facilities the regulation covers. In support of this argument, SBC cites paragraph 26 of the *First Report* and 47 C.F.R. §§ 51.1(b), 51.501(a). But none of those provisions restricts the shared facilities regulation to facilities developed in response to the Act. In fact, we were unable to find any provision in the Act or the regulations that contains such a restriction. Thus, the fact that the D-Links pre-date the Act has no bearing on the analysis.

The ICC makes a similar argument that is equally flawed. In the ICC's view, the shared facilities regulation does not apply because it, like all of the regulations in Part 51, pertains only to local traffic. Because AT&T was using the D-Links for access, *i.e.*, long-distance, traffic before 1996, the ICC says that the regulations have no application.

The regulations do not, however, differentiate between facilities that have been, or are, used solely for local traffic and those that have been, or are, used for long-distance traffic as well. Rather, the regulations apply to any local traffic governed by section 251(b), which is one kind of traffic that all parties admit now travels the D-Links. Thus, the fact that the D-Links were once used only for long-distance traffic is not dispositive.

Even if the regulation could apply to the D-Links in theory, SBC says it cannot in this instance because AT&T's lease of the D-Links is governed by a pre-1996 tariff, by which both section 251(g) and the "filed rate" doctrine require it to abide. As noted above, section 251(g) requires ILECs to provide exchange access, information access, and exchange services for such access in accordance with pre-Act compensation schemes until those schemes are superseded by new FCC regulations. The "filed rate" doctrine forbids carriers to deviate from tariffs filed with regulatory agencies. *See AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). AT&T's lease of the D-Links is governed by a pre-Act filed tariff, which sets the lease rate at $30,000.00 per month. (R. at C-03898, Arbitration Decision at 39.) Thus, SBC says, reducing the lease rate to account for its use of the D-Links would violate both the statute and the doctrine.

Requiring SBC to pay for its use of the D-Links will not, however, reduce the lease rate. The issue is not whether AT&T's lease obligation should be modified but whether a distinct usage obligation should be imposed on SBC. Because imposing such an obligation on SBC would have no impact on AT&T's lease obligation, neither the Act nor the filed rate doctrine exempts SBC from the shared facilities regulation. The ICC's decision to the contrary was in error.[3]

SS7 Signaling

As noted above, the parties must exchange SS7 signaling information so they can complete calls made by their customers to the customers of the other company. The ICC adopted a bill and keep regime for the parties' exchange of SS7 signaling, a decision AT&T challenges.

The FCC permits state commissions to institute bill and keep arrangements for section 251(b) traffic "if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so." *First Report* at ¶ 1111. In its arbitration decision, however, the ICC found that "[t]here is a traffic imbalance between SBC's and AT&T's networks; 80-85% of the traffic currently originates on SBC's network and terminates on AT&T's network." (R. at C-03898, Arbitration Decision at 39.) Thus, AT&T says, bill and keep is inappropriate.

AT&T's argument assumes that local traffic, which is subject to reciprocal compensation under section 251(b), and access traffic, which is not, are separable. If AT&T sent local and access messages to SBC over separate links, they would be. But that is not the arrangement AT&T has adopted. Rather, it has chosen to send SS7 signaling for both local and access traffic over the same

[3]The amount SBC will be required to pay is another matter. The regulation requires that "[t]he costs of shared facilities . . . be recovered in a manner that efficiently apportions costs among users." 47 C.F.R. § 51.507(c). It also says that "[c]osts of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users." *Id.* Thus, the ICC will have to determine the appropriate charge.

D-Links. (R. at C-04114, 10/30/03 ICC Clarifying Order.) That arrangement, the ICC found, and AT&T admits, makes it impossible to distinguish between local and access traffic. (*Id.* at C-04115.) Because AT&T cannot tell the two kinds of traffic apart, the ICC concluded that none of the SS7 signaling should be subject to reciprocal compensation. (*Id.*)

There is nothing suspect about that conclusion. The Act entitles AT&T to reciprocal compensation only for local traffic, yet AT&T has chosen to use a facilities configuration that prevents it from identifying that universe of traffic. That decision, the ICC reasonably concluded, caused AT&T to forfeit any reciprocal compensation to which it may otherwise have been entitled.

SBC'S CHALLENGES

Unbundled Dedicated Transport

FCC regulations require ILECs to "provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis." 47 C.F.R. § 51.319(e). "Dedicated transport" are facilities dedicated to a particular carrier for transmission of telecommunications between two switches. *See id.*; *First Report* ¶ 741. In the arbitration, AT&T argued that SBC was required to provide unbundled dedicated transport to AT&T on AT&T's side of the point at which AT&T's and SBC's networks interconnected. (R. at C-03882, Arbitration Decision at 23.) SBC contended that its was only required to provide dedicated transport between SBC's own switches. *(Id.)* Based on the FCC regulations in effect at the time, the ICC agreed with AT&T. *(Id.* at C-03883, Arbitration Decision at 24); *First Report* ¶ 440 (defining dedicated transport as "dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers."). SBC says the regulations have since changed, invalidating the ICC's decision. *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*

Carriers, FCC Nos. 01-338, 18 F.C.C.R. 19,020 ¶ 366 ("*Triennial Review Order*") ("We find that a more reasonable and narrowly-tailored definition of the dedicated transport network elements includes only those transmission facilities within an [ILEC's] transport network, that is, the transmission facilities between [ILEC] switches.").

The ICC does not quarrel with the proposition that the Court must analyze the agreement in the light of the FCC regulations that currently exist. *See McCarty*, 362 F.3d at 388 (stating that regulations "in effect upon the rendering of [the] decision . . . must be applied in [the] case"). But it says we should not get to the point of analyzing this provision at all because the dispute is not properly before the Court.

According to the ICC, the "Changes in Law" provision of the agreement requires SBC to negotiate with AT&T concerning any legal change that impacts the agreement before seeking judicial intervention. In relevant part, that provision states:

> The Parties acknowledge that the respective rights and obligations of each party as set forth in this Agreement are based on the following, as they were on February 19, 2003: the Act, the Illinois Public Utilities Act . . . ("PUA"), the rules, regulations and orders promulgated under the Act and the PUA by the FCC and by the Commission, and judicial decisions by courts of competent jurisdiction interpreting and applying said statutes, rules, regulations and orders. In the event of any legally binding judicial decision by a court of competent jurisdiction, amendment of the Act or the PUA, or legislative, federal or state regulatory action, rule, regulation or other legal action that revises, reverses, modifies or clarifies the meaning of the Act, the PUA or any of said rules, regulations, orders, or judicial decisions that were the basis of the negotiations for this Agreement, or which otherwise affect any provisions set forth in the Agreement (individually and collectively a "Change in Law"), the Parties shall renegotiate the affected provisions in this Agreement in good faith and amend this Agreement to reflect such Change in Law.

(R. at C-00221-22, Proposed Interconnection Agreement (setting forth above language as that proposed by SBC for section 1.3); R. at C-03687, Arbitration Decision at 5 (stating that ICC adopted SBC's proposed language for section 1.3).) SBC does not claim to have negotiated with AT&T over this issue. Until those negotiations happen, the ICC says, it is not clear that SBC will be injured by the dedicated transport provision in the agreement.

The Court agrees. Unless and until the contractually-mandated negotiations with AT&T – and any consequent petition to the ICC – fail, SBC's claim of injury is purely speculative. Because SBC has not, and may not ever, be injured by the dedicated transport provision, this claim is not ripe for adjudication. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (stating that claim is not ripe if it depends on "future events that may not occur as anticipated, or indeed may not occur at all") (internal quotation marks and citation omitted).

<u>Leasing of Unbundled Network Elements for AT&T's Own Use</u>

The ICC rejected SBC's challenge to the provision of the agreement that requires it to provide unbundled network elements ("UNEs") to AT&T for its own use. SBC says that provision violates the Act, which only requires it to provide UNEs to AT&T for the provision of telecommunications services to the public. AT&T and the ICC defend the decision as a permissible exercise of the ICC's state-law power to take pro-competitive measures that are consistent with the Act. The Court agrees with AT&T and the ICC.

The Act requires ILECs to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The phrase "telecommunications services" is defined as "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." 47 U.S.C. § 153(46). The Act also says, however, that it does not prohibit "a State commission from establishing or enforcing other requirements of State law in its review of an agreement" or from enforcing or enacting regulations that are "not inconsistent with the [Act]." 47 U.S.C. §§ 252(e)(3), 261(b). Thus, the Act requires SBC to: (1) give AT&T access to UNEs to provide service to the public; and (2) abide by any Illinois law that is not inconsistent with that obligation.

The Illinois Public Utilities Act ("PUA") permits any telecommunications carrier to use UNEs to "provide end to end telecommunications service . . . to its end users." 220 ILL. COMP. STAT. 5/13-801(d)(4). The PUA defines telecommunications service as:

> the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and also includes access and interconnection arrangements and services.

220 ILL. COMP. STAT. 5/13-203. It defines "end user" as "any person, corporation, partnership, firm, . . . or other entity provided with a telecommunications service for its own consumption and not for resale." 220 ILL. COMP. STAT. 5/13-217. Thus, state law permits AT&T to use UNEs to provide telecommunications service to itself and its affiliates. Because the Act does not require it to provide UNEs to AT&T for AT&T's own use, SBC says the state law requirement that it do so is inconsistent with the Act.

SBC made a similar argument to the Seventh Circuit in *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999). In that case, SBC challenged an ICC-approved provision in its interconnection agreement with various CLECs that subjected ISP-bound traffic to reciprocal compensation. *Id.* at 569. SBC contended that the provision was inconsistent with the Act, a contention our court of appeals rejected:

> The ICC concluded that . . . reciprocal compensation is applicable to local traffic billable by Ameritech. . . . Ameritech attacks this conclusion primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the

> Act (reciprocal compensation is "as described in the Act"); therefore the agreements cannot require reciprocal compensation for calls to ISPs. The syllogism is an oversimplification. That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it.

Id. at 573 (emphasis in original). The same is true here. Though the Act does not require SBC to provide UNEs to AT&T for AT&T's own use, it also does not prohibit that arrangement.

Even if the Act does not explicitly prohibit the unbundling ordered by the ICC, SBC says that the challenged provision still cannot stand because it conflicts with the goals of the Act. SBC says that the overriding objective of the Act is to promote competition in the local telephone market. In SBC's view, allowing AT&T to purchase UNEs for its own use, rather than for providing local telecommunications service to the public, will not promote competition.

SBC's argument is premised on the notion that only actions that directly impact the consuming public are pro-competitive. It can be argued, however, that any measures that enhance a CLEC's ability to compete with an ILEC, like obtaining UNEs for their own use, fosters competition.[4] In any event, Congress and the FCC apparently do not share SBC's view that this practice is anti-competitive as neither the statute nor the regulations forbid it. In the absence of such a prohibition, we cannot allow SBC's interpretation of Congressional intent to trump that which is manifest in the statute itself. Thus, we hold that the ICC's decision to require SBC to provide UNEs to AT&T for AT&T's own use is not inconsistent with the Act.[5]

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[4]There are, no doubt, other rejoinders AT&T could make to this argument if given the opportunity. Because SBC raised it for the first time in its reply brief, however, AT&T was unable to respond.

[5]Initially, SBC also argued that the ICC's decision conflicts with the FCC's mandate that CLECs use UNEs to provide "qualifying telecommunications services," which are those "'offered by requesting carriers in competition with telecommunications services that have been traditionally the exclusive or primary domain of [ILECs].'" (SBC's Br. Merits at 11 (quoting *Triennial Review Order* ¶ 141).) This argument, which is a non-starter in any event, *see U.S.*

Combination of UNEs for AT&T

Section 251(c)(3) of the Act requires ILECs to provide UNEs "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." The FCC interpreted that section as requiring an ILEC to:

> perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the [I LEC's] network, provided that such combination: (1) Is technically feasible; and (2) Would not undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with the [ILEC's] network.

47 C.F.R. § 51.315(c) ("the UNE combination regulations").

Subsequently, the Eighth Circuit invalidated those regulations. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3)."). The FCC appealed the Eighth Circuit's decision to the Supreme Court, which reversed. *See Verizon Comms. v. FCC*, 535 U.S. 467, 475 (2002) (reinstating the UNE combination regulations).

In the course of its opinion, however, the *Verizon* Court stated that those regulations have some restrictions. First, the Court said, the obligation to combine UNEs under the regulations arises only if "the [CLEC] is unable to do the job itself," "the requested combination does not discriminate against other carriers by impeding their access" and "the requested combination is 'technically feasible.'" *Id.* at 535 (quoting 47 U.S.C. § 251(c)(3)). Moreover, when the duty does arise, the ILEC

Telecom Ass'n v. FCC, 359 F.3d 554, 592 (D.C. Cir. 2004) (vacating qualifying/non-qualifying distinction), was withdrawn by SBC. (*See* SBC's Corrected Reply Br. at 22.)

must "'perform the functions necessary to combine,' not necessarily . . . complete the actual combination," and the CLEC "must pay 'a reasonable cost-based fee' for whatever the [ILEC] does." *Id.* (quoting 47 C.F.R. § 51.315(c)-(d)).

In light of *Verizon*, SBC proposed that the following language be included in the agreement:

> SBC's UNE combining obligations referenced in this Section 9.3 apply only in situations where each of the following is met:
>
> 9.3.3.9.1 it is technically feasible, including that network reliability and security would not be impaired; *Verizon Comm. Inc. v. FCC*, 122 S.Ct. 1646, 1685 (May 13, 2002);
>
> 9.3.3.9.2 SBC-AMERITECH'S ability to retain responsibility for the management, control and performance of its network would not be impaired;
>
> 9.3.3.9.3 SBC-AMERITECH would not be placed at a disadvantage in operating its own network;
>
> 9.3.3.9.4. it would not impair the ability of other Telecommunications Carriers to obtain access to UNEs or to interconnect with SBC-AMERITECH'S network. *Verizon Comm. Inc. v. FCC*, 122 S.Ct. 1646, 1685 (May 13, 2002); and
>
> 9.3.3.9.5 CLEC is
>
>> 9.3.3.9.5.1 unable to make the combination itself; *Verizon Comm. Inc. v. FCC*, 122 S.Ct. 1646, 1685 (May 13, 2002); or
>>
>> 9.3.3.9.5.2 a new entrant and is unaware that it needs to combine certain UNEs to provide a telecommunications service (*Verizon Comm. Inc. v. FCC*, 122 S.Ct. 1646, 1685 (May 13, 2002)), but such obligation under this Section 3.9.3 ceases if SBC-13STATE informs CLEC of such need to combine.

(R. at C-01853-54, SBC's Initial Post-Trial Br. at 108-09.)

The ICC rejected this proposed language, and adopted that proposed by AT&T, which states:

> Upon AT&T's request, SBC-Ameritech shall perform the functions necessary to combine SBC-Ameritech's Unbundled Network Elements in any manner, even if those elements are not ordinarily combined in SBC-Ameritech's network; provided that such combination is: (i) technically feasible, and (ii) would not impair the ability

> of other Telecommunications Carriers to obtain access to Unbundled Network Elements or to Interconnect with SBC-Ameritech's network. In addition, upon a request of AT&T that is consistent with the above criteria, SBC-Ameritech shall perform the functions necessary to combine SBC-Ameritech's Unbundled Network Elements with elements possessed by AT&T in any technically feasible manner.

(R. at C-03921, Arbitration Decision at 62.) The ICC gave the following rationale for its decision:

> The Commission has examined thoroughly those portions of the Supreme Court's ruling in *Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646 (2002) that concern FCC Rules 47 CFR Section 51.315(c) through (f). It is not disputed by any party that the Verizon decision upholds these rules. In doing so, the Supreme Court relied in part upon certain limitations on application of these rules as set forth in the FCC's Local Competition Order. We find that it would be appropriate to place into the agreement provisions from the Local Competition Order referenced by the Supreme Court's Verizon decision. Therefore, it would be unnecessary and inappropriate to place into the agreement any language from the Verizon decision itself.

(*Id.* at C-03920, Arbitration Decision at 61.) SBC contends that the ICC's decision violates the Act and the regulations as interpreted by the Supreme Court in *Verizon*.

The Court agrees. As the Seventh Circuit noted, the *Verizon* Court did not just reinstate the UNE combination regulations invalidated by the Eighth Circuit, it also "added an interpretive gloss" to them. *McCarty*, 362 F.3d at 390. That "gloss" consisted of the five restrictions outlined by the Court. *See Verizon*, 535 U.S. at 535. The language proposed by AT&T and adopted by the ICC states that SBC is required to perform the functions necessary for AT&T to combine UNEs if doing so is technically feasible and will not impede other carriers' access, three of the five *Verizon* restrictions. *See id.*; *McCarty*, 362 F.3d at 390. That language does not, however, make SBC's combination obligation contingent on AT&T's inability to combine UNEs itself or require AT&T to pay SBC "a reasonable cost-based fee" for any of SBC's combination efforts, the remaining two restrictions. Absent those provisions, the UNE combination provision in the parties' agreement violates federal law.

Conclusion

For the foregoing reasons, the Court enters judgment declaring that the decisions of the ICC to: (1) subject ISP-bound FX traffic to bill and keep; (2) subject voice FX traffic to bill and keep; (3) require AT&T to share its D-Links, free of charge, with SBC; and (4) require SBC to combine UNEs for AT&T without regard to the *Verizon* restrictions violate federal law. The Court enjoins the parties from enforcing those provisions of the interconnection agreement and orders them to modify the agreement in accordance with this Memorandum Opinion and Order. The Court renders no decision on the issue of whether SBC must provide AT&T with unbundled dedicated transport between AT&T's switch and SBC Illinois' switch because that issue is not ripe for decision. In all other respects, the challenged decisions of the ICC are affirmed. This is a final and appealable order.

SO ORDERED. **ENTERED:**

Ronald A. Guzman

HON. RONALD A. GUZMAN
United States District Judge

March 25, 2005